



## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[RTID 0648-XC260]

#### **Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the North Jetty Maintenance and Repairs Project in Coos Bay, Oregon**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; issuance of two incidental harassment authorizations (IHAs).

**SUMMARY:** In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued two IHAs to the U.S. Army Corps of Engineers (Corps) to incidentally harass marine mammals during in-water construction activities associated with the North Jetty Maintenance and Repairs Project in Coos Bay, Oregon. There are no changes from the proposed authorizations in these final authorizations.

**DATES:** These authorizations are effective from September 1, 2022 through August 31, 2023 and March 1, 2024 through February 28, 2025.

**FOR FURTHER INFORMATION CONTACT:** Amy Fowler, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the original application and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at:

*<https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>*. In case of problems accessing these documents, please call the contact listed above.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

The MMPA prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed incidental harassment authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as “mitigation”); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

### **History of Request**

On March 18, 2019, NMFS received a request from USACE for two IHAs to take 7 species of marine mammals, by Level B harassment only, incidental to vibratory pile driving and removal associated with the North Jetty Maintenance and Repairs Project in Coos Bay, Oregon over the course of two years with pile installation occurring during

Year 1 and pile removal occurring during Year 2. The application was deemed adequate and complete on September 10, 2019. Neither USACE nor NMFS expects injury, serious injury or mortality to result from this activity and, therefore, IHAs are appropriate. On January 3, 2020, NMFS issued the two IHAs to the USACE (85 FR 1140; January 9, 2020). The Year 1 IHA was effective from September 1, 2020 through August 31, 2021 and the Year 2 IHA was effective July 1, 2022 through June 30, 2023.

On February 20, 2021, the USACE notified NMFS that the project had been delayed and none of the work identified in the year 1 IHA (*e.g.*, pile installation) had occurred. On May 4, 2021, NMFS reissued the Year 1 IHA, effective September 1, 2021 through August 31, 2022 (86 FR 24850; May 10, 2021).

On February 23, 2022, the USACE notified NMFS that the project had been further delayed and work had still not commenced. The USACE submitted an application for both IHAs to be reissued, with the Year 1 IHA effective from September 1, 2022 through August 31, 2023 and the Year 2 IHA effective from March 1, 2024 through February 28, 2025. NMFS has determined that the USACE's planned activities (including mitigation, monitoring, and reporting), estimated incidental take, and anticipated impacts on the affected stocks are the same as those analyzed and authorized in the initial IHAs. There are no changes from the proposed IHAs to the final IHAs.

### **Comments and Responses**

Since the initial IHAs were issued several years ago, NMFS published a notice of proposed IHAs in the **Federal Register** on July 13, 2022 (87 FR 41665) requesting public input on the request for authorization described therein, our analyses, the proposed reissued authorizations, and any other aspect of the notice of proposed IHAs, and requested that interested persons submit relevant information, suggestions, and comments. This proposed notice was available for a 30-day public comment period. No public comments were received on the proposed notice.

## Description of the Planned Activity and Anticipated Impacts

The reissued IHAs include the same in-water construction activities (*i.e.*, vibratory pile installation and removal) in the same locations that were described in the initial IHAs. The mitigation, monitoring, and reporting measures remain the same as prescribed in the initial IHAs. NMFS refers the reader to the documents related to the initial IHAs issued on January 3, 2020 (available at <https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-army-corps-engineers-north-jetty-maintenance-and-repairs>) for more detailed descriptions of the project activities. Other relevant documents include the **Federal Register** notice of proposed IHAs and request for comments (84 FR 56781; October 23, 2019), notice of issued IHAs (85 FR 1140; January 9, 2020), and notice of reissued Year 1 IHA (86 FR 24850; May 10, 2021).

### *Detailed Description of the Action*

A detailed description of the USACE's planned construction activities is found in these previous documents. The location, time of year, and nature of the activities, including the types of piles and methods of installation and removal, are identical to those described in the previous documents.

### *Description of Marine Mammals*

A description of the marine mammals in the area of the activities is found in these previous documents, which remains applicable to these reissued IHAs as well. In addition, NMFS has reviewed the draft 2021 Stock Assessment Reports (SARs; Carretta *et al.*, 2021; Muto *et al.*, 2021), information on relevant Unusual Mortality Events, and recent scientific literature, and determined that no new information affects our original analysis of impacts under the initial IHAs. The estimated abundances of the California Breeding stock of northern elephant seals (*Mirounga angustirostris*), the Northern California/Southern Oregon stock of harbor porpoises (*Phocoena phocoena*), the West

Coast Transient stock of killer whales (*Orcinus orca*), and the Eastern U.S. stock of Steller sea lions (*Eumetopias jubatus*) in the 2021 draft SARs have all increased from the numbers presented in the **Federal Register** notices for the initial IHAs (84 FR 56781, October 23, 2019; 85 FR 1140, January 9, 2020).

#### *Potential Effects on Marine Mammals and their Habitat*

A description of the potential effects of the specified activities on marine mammals and their habitat is found in the documents supporting the initial IHAs, which remains applicable to the reissuance of the IHAs. There is no new information on potential effects.

#### *Estimated Take*

A detailed description of the methods and inputs used to estimate take for the specified activities are found in the notice of issuance of the initial IHAs (85 FR 1140; January 9, 2020). The methods of estimating take for the reissued IHAs are identical to those used in the initial IHAs. The source levels, days of operation, and marine mammal density remain unchanged from the previously issued IHAs. Regarding authorized take, the stocks taken, types of take, and methods of taking remain unchanged from the previously issued IHAs, as do the number of takes, which are indicated below.

**Table 1. Authorized Take by Level B Harassment and as a Percentage of Stock Abundance in Each Year**

Marine Mammal	Level B Harassment AZ sheets (or H-piles)	Level B Harassment 30-inch piles	Level B Harassment AZ sheets (or H-piles)	Level B Harassment 30-inch piles	Total Authorized Take by Level B Harassment (percent of stock)	Total Authorized Take by Level B Harassment (percent of stock)
	YR-1 Installation	YR-1 Installation	YR-2 Removal	YR-2 Removal	YR-1 Installation	YR-2 Removal
Harbor seal ( <i>Phoca vitulina</i> )	1,169	1,169	1,169	1,169	2,238 (9.45 percent)	2,238 (9.45 percent)
Northern Elephant seal	7	7	7	7	14 (< 0.01 percent)	14 (< 0.01 percent)

<i>(Mirounga angustirostris)</i>						
Steller sea lion <i>(Eumetopias jubatus)</i>	14	14	14	14	28 (0.06 percent)	28 (0.06 percent)
California sea lion <i>(Zalophus californianus)</i>	21	21	21	21	42 (0.02 percent)	42 (0.02 percent)
Gray whale <i>(Eschrichtius robustus)</i>	1	1	1	1	2 ( $< 0.01$ percent)	2 ( $< 0.01$ percent)
Killer whale <i>(Orcinus orca)</i>	2		2		2 (0.57 percent)	2 (0.57 percent)
Harbor porpoise <i>(Phocoena phocoena)</i>	2	2	2	2	4 (0.02 percent)	4 (0.02 percent)

### *Description of Mitigation, Monitoring and Reporting Measures*

The required mitigation, monitoring, and reporting measures described here are identical to those included in the **Federal Register** notice announcing the issuance of the initial IHAs (85 FR 1140; January 9, 2020) and the discussion of the least practicable adverse impact included in that document remains accurate. Unless otherwise stated, the following measures are included in both IHAs:

#### Timing Restrictions

All work must be conducted during daylight hours. If poor environmental conditions restrict visibility full visibility of the shutdown zone, pile installation must be delayed.

#### Shutdown Zone for in-water Heavy Machinery Work

For in-water heavy machinery work other than pile driving, if a marine mammal comes within 10 meters (m) of such operations, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions.

#### *Shutdown Zones*

For all pile driving/removal activities, the USACE must establish shutdown zones for a marine mammal species that is greater than its corresponding Level A harassment zone. To be conservative, the USACE must implement one cetacean shutdown zone (55 m) and one pinniped shutdown zone (25 m) during any pile driving/removal activity (*i.e.*, during sheet piles, H-piles, and 30-in steel pile installation and removal) (Table 2) which exceeds the maximum calculated PTS isopleths as described in Table 7 of the **Federal Register** notice announcing the issuance of the initial IHAs (85 FR 1140; January 9, 2020). The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area).

**Table 2. Pile Driving Shutdown Zones during Project Activities**

Activity	Shutdown Zones (radial distance in m, area in square kilometers (km <sup>2</sup> ))				
	Low-Frequency Cetaceans	Mid-Frequency Cetaceans	High-Frequency Cetaceans	Phocid	Otariid
In-Water Construction Activities					
Heavy machinery work (other than pile driving)	10 (0.00015)	10 (0.00015)	10 (0.00015)	10 (0.00015)	10 (0.00015)
Vibratory Pile Driving/Removal					
12-in H pile steel installation/removal	55 (0.00475)	55 (0.00475)	55 (0.00475)	25 (0.00098)	25 (0.00098)
24-in sheet pile installation/removal	55 (0.00475)	55 (0.00475)	55 (0.00475)	25 (0.00098)	25 (0.00098)
30-in pile installation/removal	55 (0.00475)	55 (0.00475)	55 (0.00475)	25 (0.00098)	25 (0.00098)

\*Note: km<sup>2</sup> were divided by two to account for land.

#### Non-authorized Take Prohibited

If a species enters or approaches the Level B harassment zone and that species is either not authorized for take or its authorized takes are met, pile driving and removal activities must shut down immediately using delay and shutdown procedures. Activities must not resume until the animal has been confirmed to have left the area or an observation time period of 15 minutes has elapsed for pinnipeds and small cetaceans and 30 minutes for large whales.

## Pre-Activity Monitoring

Prior to the start of daily in-water construction activity, or whenever a break in pile driving of 30 min or longer occurs, protected species observers (PSOs) must observe the shutdown and monitoring zones for a period of 30 minutes. The shutdown zone is cleared when a marine mammal has not been observed within the zone for that 30-minute period. If a marine mammal is observed within the shutdown zone, pile driving activities must not begin until the animal has left the shutdown zone or has not been observed for 15 min. If the Level B Harassment Monitoring Zone has been observed for 30 min and no marine mammals (for which take has not been authorized) are present within the zone, work will continue even if visibility becomes impaired within the Monitoring Zone. If a marine mammal for which take has been permitted is present in the Monitoring zone, piling activities will begin and Level B harassment take will be recorded.

## Monitoring Zones

The USACE must establish and observe monitoring zones for Level B harassment. The monitoring zones for this project are areas where received sound pressure levels (SPLs) are equal to or exceed 120 decibels root-mean-square (dB rms) (for vibratory pile driving/removal). For vibratory installation and removal of 12-inch H piles, the Level B harassment zone and monitoring zone is 1,000 m. For vibratory installation and removal of 24-inch steel sheet piles, the Level B harassment zone and monitoring zone is 4,642 m. For vibratory installation and removal of 30-inch steel pipe piles, the Level B harassment zone and monitoring zone is 8,577 m. These zones provide utility for monitoring conducted for mitigation purposes (*i.e.*, shutdown zone monitoring) by establishing monitoring protocols for areas adjacent to the shutdown zones.

Monitoring of the Level B harassment zones enables observers to be aware of and communicate the presence of marine mammals in the project area, and thus prepare for potential shutdowns of activity. The USACE must also gather information to help better



understand the impacts of their planned activities on species and their behavioral responses.

### Visual Monitoring

Monitoring must be conducted 30 minutes before, during, and 30 minutes after all pile driving/removal activities. In addition, PSOs must record all incidents of marine mammal occurrence, regardless of distance from activity, and shall document any behavioral reactions in concert with distance from piles being driven/removed. Pile driving/removal activities include the time to install, remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than thirty minutes.

Monitoring must be conducted by PSOs from on land and boat. The number of PSOs will vary from one to three, depending on the type of pile driving, method of pile driving and size of pile, all of which determines the size of the harassment zones. Monitoring locations must be selected to provide an unobstructed view of all water within the shutdown zone and as much of the Level B harassment zone as possible for pile driving activities. During vibratory driving or removal of sheet or H-piles, two PSOs must be present. One PSO must be located on the shoreline adjacent to the Material Off-loading Facility (MOF) site or on the barge used for driving piles. The other PSO must be boat-based and detect animals in the water, along with monitoring the three haulout sites in the Level B harassment zone (*i.e.*, Pigeon Point, Clam Island/North Spit, and South Slough). During vibratory driving and removal of 30-inch steel pipe piles, three PSOs must be present. As indicated above, one PSO must be on the shoreline or barge adjacent to the MOF site. A second PSO must be stationed near the South Slough haul out site, and the third PSO must be boat-based and make observations while actively monitoring at and between the two remaining haulout sites (*i.e.*, Pigeon Point and Clam Island).

In addition, PSOs must work in shifts lasting no longer than 4 hours with at least a 1-hour break between shifts, and must not perform duties as a PSO for more than 12 hours in a 24-hour period (to reduce PSO fatigue).

Monitoring of pile driving must be conducted by qualified, NMFS-approved PSOs, who must have no other assigned tasks during monitoring periods. The USACE must adhere to the following conditions when selecting PSOs:

- Independent PSOs must be used (*i.e.*, not construction personnel);
- At least one PSO must have prior experience working as a marine mammal observer during construction activities;
- Other PSOs may substitute education (degree in biological science or related field) or training for experience;
- Where a team of three or more PSOs are required, a lead observer or monitoring coordinator must be designated. The lead observer must have prior experience working as a marine mammal observer during construction; and
- The USACE must submit PSO CVs for approval by NMFS for all observers prior to monitoring.

The USACE must ensure that the PSOs have the following additional qualifications:

- Visual acuity in both eyes (correction is permissible) sufficient for discernment of moving targets at the water's surface with ability to estimate target size and distance; use of binoculars may be necessary to correctly identify the target;
- Experience and ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including the identification of behaviors;

- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior;
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary; and
- Sufficient training, orientation, or experience with the construction operations to provide for personal safety during observations.

#### Reporting of Injured or Dead Marine Mammals

In the unanticipated event that the planned activity clearly causes the take of a marine mammal in a manner prohibited by the IHA, such as serious injury, or mortality, the USACE must immediately cease the specified activities and report the incident to the NMFS Office of Protected Resources and the West Coast Region Stranding Coordinator.

The report must include the following information:

- Time and date of the incident;
- Description of the incident;
- Environmental conditions (*e.g.*, wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- Description of all marine mammal observations and active sound source use in the 24 hours preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and

- Photographs or video footage of the animal(s).

Activities must not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with USACE to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The USACE must not resume their activities until notified by NMFS.

In the event the USACE discovers an injured or dead marine mammal, and the lead observer determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.*, in less than a moderate state of decomposition), the USACE must immediately report the incident to the Office of Protected Resources, NMFS, and the West Coast Region Stranding Coordinator, NMFS. The report must include the same information as the bullets described above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with the USACE to determine whether additional mitigation measures or modifications to the activities are appropriate.

In the event that the USACE discovers an injured or dead marine mammal, and the lead observer determines that the injury or death is not associated with or related to the specified activities (*e.g.*, previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), the USACE must report the incident to the Office of Protected Resources, NMFS, and the West Coast Region Stranding Coordinator, NMFS, within 24 hours of the discovery.

#### Final Report

The USACE must submit a draft report to NMFS no later than 90 days following the end of construction activities or 60 days prior to the issuance of any subsequent IHA for the project. PSO datasheets/raw sightings data must also be submitted with the reports. The USACE must provide a final report within 30 days following resolution of NMFS' comments on the draft report. Reports must contain, at minimum, the following:

- Date and time that monitored activity begins and ends for each day conducted (monitoring period);
- Construction activities occurring during each daily observation period, including how many and what type of piles driven;
- Deviation from initial proposal in pile numbers, pile types, average driving times, etc.;
- Weather parameters in each monitoring period (*e.g.*, wind speed, percent cloud cover, visibility);
- Water conditions in each monitoring period (*e.g.*, sea state, tide state);
- For each marine mammal sighting: species, numbers, and, if possible, sex and age class of marine mammals; number of individuals of each species (differentiated by month as appropriate) detected within the monitoring zones, and estimates of number of marine mammals taken, by species (a correction factor may be applied to total take numbers, as appropriate); description of any observable marine mammal behavior patterns, including bearing and direction of travel and distance from pile driving activity; type of construction activity that was taking place at the time of sighting; location and distance from pile driving activities to marine mammals and distance from the marine mammals to the observation point; and if shutdown was implemented, behavioral reactions noted and if they occurred before or after shutdown;
- Description of implementation of mitigation measures within each monitoring period (*e.g.*, shutdown or delay);
- Other human activity in the area within each monitoring period; and
- A summary of the following: total number of individuals of each species detected within the Level B Harassment Zone, and estimated as taken if correction factor appropriate (Level B harassment takes must be extrapolated based upon the number of observed takes and the percentage of the Level B Harassment Zone that was not visible);

total number of individuals of each species detected within the Level A Harassment Zone and the average amount of time that they remained in that zone; and daily average number of individuals of each species (differentiated by month as appropriate) detected within the Level B Harassment Zone, and estimated as taken, if appropriate.

### **Determinations**

The USACE's planned in-water construction activities as well as the mitigation, monitoring, and reporting requirements are unchanged from those in the initial Year 1 and Year 2 IHAs. The anticipated effects of the activities on the affected species and stocks and the estimated take of each species and stock also remain unchanged. When issuing the initial IHAs, NMFS found that each year of the Coos Bay North Jetty Maintenance and Repairs Project would have a negligible impact to species or stocks' rates of recruitment and survival and the amount of taking would be small relative to the population size of such species or stock (less than 10 percent). In conclusion, there is no new information suggesting that our analysis or findings should change.

Based on the information contained here and in the referenced documents, NMFS has determined the following for each IHA: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) the USACE's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action; and (5) appropriate monitoring and reporting requirements are included.

### **National Environmental Policy Act**

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must

review our proposed action (*i.e.*, the issuance of these IHAs) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of the IHAs qualifies to be categorically excluded from further NEPA review.

#### **Endangered Species Act (ESA)**

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. No take of ESA-listed marine mammals are authorized. Therefore, NMFS has determined that consultation under section 7 of the ESA is not required for this action.

#### **Authorization**

As a result of these determinations, NMFS has issued two IHAs to the USACE for conducting the North Jetty Maintenance and Repairs Project in Coos Bay, Oregon over the course of two non-consecutive years, beginning September 2022 through February 2025, with the previously mentioned mitigation, monitoring, and reporting requirements incorporated.

Dated: August 19, 2022.

**Kimberly Damon-Randall,**

*Director, Office of Protected Resources,*

*National Marine Fisheries Service.*

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